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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SALVADOR FERNANDO GUTIERREZ,

Defendant and Appellant.

F062544

(Super. Ct. No. DF009589)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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Salvador Fernando Gutierrez forced his way into a house, shot one of the occupants in the head, and hit another occupant with a gun. Property stolen from another house was found in his car. He was convicted of attempted murder, burglary, being a felon in possession of a firearm, receiving stolen property, and assault with a firearm. He

testified at trial, and in his version of events, he was a drug dealer. An occupant of the house was his supplier, and the shooting was an accident that happened when a disagreement arose over payment, and the supplier's brother-in-law pulled a gun, leading to a struggle. The jury rejected this story and the court sentenced Gutierrez to 26 years eight months plus 25 years to life.

In this appeal, Gutierrez argues that the court prejudicially erred when it failed to instruct the jury on self-defense for the charge of being a felon in possession of a firearm. He also argues that the court erroneously denied his posttrial request for confidential information about a juror who purportedly fell asleep. We reject these arguments.

The parties agree that Gutierrez's sentence for burglary should have been stayed under Penal Code section 654[1] instead of being imposed as a concurrent sentence. In addition, the court erroneously calculated the sentence for burglary as one-third of the middle term under section 1170.1, subdivision (a). This method of calculation is not applicable to stayed sentences. It will be necessary to remand for resentencing to allow the trial court to exercise its discretion to select the lower, middle, or upper term for the stayed sentence on count 3. Finally, there are clerical errors in the abstract of judgment for the sentence on count 5, receiving stolen property, and for an enhancement on count 6, assault with a firearm. We order these be corrected.

FACTUAL AND PROCEDURAL HISTORIES

On October 29, 2009, police received a report of a shooting at 2210 San Felice Way in Delano, the home of Brenda Cadiz and her husband Melecio Cadiz. Brenda's brother, Joejo Raquinio, lived with her. Officers found Brenda lying in a neighboring driveway with one gunshot wound to the head and three to the left arm. She and Raquinio told the officers that a man had come to the house saying he was seeking a job with Melecio. When he was told there were no jobs, he forced his way into the house, produced a gun, and shot Brenda repeatedly. Raquinio and the man struggled; the man hit

[1]Subsequent statutory references are to the Penal Code unless otherwise stated.

Raquinio in the head with the gun, and Raquinio hit the man over the head with a vase. The man fled on foot. He had once worked for the family. Raquinio and Brenda knew him as Fernando.

Following a trail of drops of blood, the officers tracked Gutierrez to 2222 Ruffion Court, a block away, where they found him hiding in a shed, bleeding, in the back yard. With him in the shed were some pieces of jewelry and a glass smoking pipe. Brenda and her daughter, Kaelah Cadiz, identified Gutierrez as the man who had been at the house.

The officers took a set of car keys from Gutierrez. They found his car, which was parked a short distance from Brenda's house, and searched it pursuant to a warrant. Inside was a gym bag containing 100 to 150 pieces of jewelry and some baseball memorabilia. Some of the jewelry and the baseball memorabilia had been reported stolen from a home in Visalia. On the roof of the house at 2214 Ruffion Court, two houses south of the shed where Gutierrez was hiding, the officers found a .32-caliber revolver with four spent shell casings in the cylinder.

The district attorney filed an information charging Gutierrez with six counts: (1) attempted murder of Brenda (§§ 187, 664); (2) assault of Brenda with a firearm (§ 245, subd. (a)(2)); (3) first degree burglary (§ 460, subd. (a)); (4) being a felon in possession of a firearm (former § 12021, subd. (a)(1));[2] (5) receiving stolen property (§ 496, subd. (a)); and (6) assault of Raquinio with a firearm (§ 245, subd. (a)(2)). For sentence-enhancement purposes, the information alleged that Gutierrez used a firearm in committing the offenses in counts 1, 2 and 6. (§§ 12022.5, subd. (a)(1); 12022.53, subd. (d).) The information also alleged that Gutierrez had one prior strike conviction for purposes of the Three Strikes Law (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and four prior convictions resulting in prison terms (§ 667.5, subd. (b)).

Gutierrez testified at trial, contradicting the account given by the victims. In his version, he was a methamphetamine dealer and Melecio Cadiz was his supplier. In the

[2]This statute now appears at section 29800, subdivision (a).

past, Melecio had accepted payment for methamphetamine in the form of jewelry and electronic devices. Sometimes Brenda chose the pieces.

Gutierrez came to the Cadizes' house on October 29, 2009, to show Brenda jewelry. They sat in her car and smoked some methamphetamine, and then went in the house to look at the jewelry. Gutierrez set out some pieces on a coffee table in the living room while Brenda talked on the phone in the kitchen. Raquinio came into the living room and looked at the jewelry. He offered Gutierrez $250 for some rings, including a Kansas City Royals American League Championship ring, but Gutierrez wanted $500. Raquinio became angry and pulled out a pistol.

Gutierrez gathered up the jewelry and tried to leave, but Brenda shut the door as Raquinio hit Gutierrez on the head with a vase. Gutierrez fell and Raquinio pointed the gun at him. Gutierrez tried to take the gun from Raquinio and, as they struggled, the gun went off twice and Brenda was shot. Then Gutierrez passed out. When he regained consciousness, Brenda and Raquinio had left the room.

Gutierrez tried to flee through the back door but encountered Raquinio, who still had the gun, in the laundry room. Gutierrez tried to take the gun again, succeeding this time. The gun went off two more times as the two men fought. Raquinio continued to struggle, so Gutierrez hit him on the head with the gun in self-defense. Gutierrez then fled the house. He threw the gun away because he feared the police would shoot him if they saw him with it. In the street, people looked at him in a way he felt was accusatory. He hid in the shed because he was afraid. Then he lost consciousness again. He was in possession of the property stolen from Visalia because someone gave it to him to pay for methamphetamine.

The jury rejected Gutierrez's story and found him guilty of counts 1, 3, 4, 5, and 6. Following the court's instructions, it returned no verdict on count 2 because it was a lesser offense included in count 1. The jury also found true the firearm allegations for counts 1 and 6. The court found true two of the prior-prison-term allegations and the prior-strike allegation.

After the verdict, Gutierrez filed a petition for the disclosure of identifying juror information. The petition alleged that a juror fell asleep while evidence was being presented. Gutierrez stated in a declaration that he saw juror number nine "'drop off'" and then wake up. He passed a note to defense counsel, but counsel did nothing. Gutierrez wished to contact the juror for the purpose of gathering evidence to develop a motion for a new trial based on juror misconduct.

The court heard arguments on the petition. The prosecutor stated that he also recalled a juror who closed her eyes from time to time, but he did not believe this was "anything substantial." The court recalled a recent trial in which a juror sometimes closed her eyes, but it was not certain whether it was Gutierrez's trial. The court took the petition under submission. Later, it issued a minute order denying the petition. The order stated:

> "The allegation of juror inattention here is insufficient to raise any reasonable grounds for new trial. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1349.) This petition causes the court, upon reflection, to recall that the juror in question (juror number 9) was observed by the court during trial to occasionally briefly close her eyes during testimony, but she always promptly opened them and did not appear sleepy or otherwise lacking in alertness."

For count 1, attempted murder, the court imposed the upper term of nine years, doubled to 18 years because it was a second strike, plus one year for each of the two prior prison terms, plus 25 years to life for the firearm enhancement. For count 3, burglary, the court imposed a term of two years eight months, concurrent with count 1. For count 4, being a felon in possession of a firearm, the court imposed a term of six years, stayed under section 654. For count 5, receiving stolen property, the sentence was one year four months, to be served consecutively. For count 6, assault with a firearm, the sentence was

two years, plus three years four months for the firearm enhancement, to be served consecutively. The aggregate sentence was 26 years eight months, plus 25 years to life.[3]

DISCUSSION

I. Self-defense instruction for being a felon in possession of a firearm

Gutierrez argues that for count 4, possessing a firearm while a felon, the court was obligated to instruct the jury sua sponte on temporary possession for purposes of self-defense. The People argue that the instruction need not have been given because there was no substantial evidence to support it. The People also argue that any error was harmless.

We need not decide whether it was error not to give the instruction. Erroneous failure to give a jury instruction warrants reversal only if the failure is prejudicial. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) This general rule applies to an erroneous failure to instruct on an affirmative defense. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 23.) The California Supreme Court has applied the beyond-a-reasonable-doubt standard of harmless error review to this type of error (*ibid.*), but has suggested that the less-stringent reasonable-probability test might be appropriate instead (*People v. Salas* (2006) 37 Cal.4th 967, 984).[4] For two reasons, we agree with the People that any error in failing to give a self-defense instruction for count 4 was harmless under any standard.

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[3]These sentencing numbers are based on the court's oral statements at the sentencing hearing. As will be seen, the abstract of judgment contains clerical errors, which we will order the trial court to correct.

[4]Gutierrez cites a California Center for Judicial Education and Research publication for the proposition that a court's erroneous *refusal* to give a self-defense instruction is reversible per se. The publication relies on *People v. Lemus* (1988) 203 Cal.App.3d 470, 478, which stated that this type of error is not subject to harmless-error review unless the factual question posed by the omitted instruction was resolved against the defendant under another instruction. Gutierrez cites no authority for the view that the mere erroneous *omission* of a self-defense instruction is reversible per se. In the absence of any authority, we will not accept that view, as it is inconsistent with the California Supreme Court's general stance on harmless error, i.e., that trial court error is reversible only when it results in a miscarriage of justice.

First, the jury found Gutierrez guilty of the attempted murder of Brenda. This means the jury believed Gutierrez shot Brenda with malice aforethought. To be not guilty of being a felon in possession of a firearm under a theory of self-defense, a felon must be in "temporary possession of [the] weapon for a period no longer than that in which the necessity … to use it in self-defense continues …." (*People v. King* (1978) 22 Cal.3d 12, 24.) If the period during which Gutierrez possessed the gun included the time when he tried to murder Brenda with it, then it is exceedingly unlikely that the period was limited to a time when he needed the gun for self-defense. Since the jury believed Gutierrez committed attempted murder with the gun, there is virtually no chance that, if instructed on the issue, it would have found that the prosecution failed to prove he possessed it for a longer time than he needed it for self-defense, assuming it would have found he ever needed it for self-defense at all.

Second, the jury found Gutierrez guilty of assaulting Raquinio with the gun. Again, it is extremely difficult to see how he could have committed this offense if he was in possession of the gun only for as long as he needed it for self-defense.

In sum, it is obvious that the jury accepted the prosecution's account in which Gutierrez was the aggressor and rejected the defense account in which Raquinio and Brenda were the aggressors. In light of this, we are confident, beyond a reasonable doubt, that if the court had given the instruction at issue, the jury would still have found Gutierrez guilty of being a felon in possession of a firearm.

II. Petition for juror information

Gutierrez argues that the court erred when it denied his petition for identifying information on juror number nine. We disagree.

The court's decision on the petition was governed by Code of Civil Procedure sections 206, subdivision (g), and 237, subdivision (b). Any person may petition the court for access to sealed juror information. (Code Civ. Proc., § 237, subd. (b).) This includes a criminal defendant seeking the information for purposes of a new trial motion after a jury verdict has been recorded. (Code Civ. Proc., § 206, subd. (g).) The court must set

the matter for hearing if the petition and supporting declarations establish "a prima facie showing of good cause" for release of the information, but must not set the matter for hearing if "there is a showing on the record of facts that establish a compelling interest against disclosure." (Code Civ. Proc., § 237, subd. (b).) If the court does not set the matter for hearing, it must issue a minute order making express findings that a prima facie showing of good cause to disclose was not made or that a compelling interest against disclosure was established. (*Ibid.*) We review the trial court's denial of the petition for abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 604.)

We interpret the trial court's ruling to mean that Gutierrez did not make a prima facie showing of good cause. Juror inattentiveness can amount to misconduct (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1349), but sporadic inattentiveness generally does not justify a new trial. The Supreme Court has remarked: "We have observed that '[a]lthough implicitly recognizing that juror inattentiveness may constitute misconduct, courts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial …. [The reported] cases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial. [Citations.]'" (*Ibid.*) In *Bradford*, the Supreme Court held that the trial court did not abuse its discretion in declining to hold an evidentiary hearing on alleged juror inattentiveness because the record contained no references to the juror's inattentiveness over a "substantial period," even though the trial court acknowledged it had seen the juror sleeping on two occasions. (*Id.* at pp. 1347-1348.) The present case is comparable. The court and parties agreed that juror number nine had been closing her eyes, but, upon reflection, the court remembered that she had done so only for brief periods and appeared alert. Under the approach established in *Bradford*, it was not an abuse of discretion under these circumstances to find that Gutierrez failed to make a prima facie case of good cause to release the information.

Gutierrez doubts the reliability of the remarks in the trial court's minute order, saying there is no explanation of how the court decided juror number nine was not

inattentive for any substantial period despite its earlier remarks that it did not remember in which trial it had seen a juror with her eyes closed. We have no reason here, however, to second-guess findings the trial court made based on its own observations. There is nothing unusual about taking some time fully to recall an incident after it has been brought to one's attention.

III. Sentencing issues

A. Count 3

The court imposed a concurrent sentence for count 3, burglary, of two years eight months, equal to one-third of the middle term, doubled because of the prior strike. The parties agree that this sentence should have been stayed under section 654 because the jury instructions stated that the burglary count was based on Gutierrez's intent to commit murder or assault with a firearm when he entered the house. The prosecutor conceded at the sentencing hearing that the burglary sentence should be stayed under these circumstances, and the court said the concession was well-taken. We order the trial court to make the necessary modification.

The People also argue that the court erred when it imposed a sentence for count 3 based on one-third of the middle term under section 1170.1, subdivision (a), since this method of calculation is not applicable to a stayed sentence. We agree. In *People v. Cantrell* (2009) 175 Cal.App.4th 1161, the trial court imposed a sentence of nine years on count 1 for burglary with enhancements, and a stayed sentence on count 2 for attempted robbery. The defendant argued that the stayed sentence should be based on one-third of the middle term, which, with enhancements, would have been 16 months. The People argued that the sentence for the stayed term should have been the low term, which, with enhancements, would have been 32 months. (*Id.* at p. 1164.) The Court of Appeal agreed with the People. It held that "[t]he one-third-the-midterm rule of section 1170.1, subdivision (a), only applies to a consecutive sentence, not a sentence stayed under section 654. If count 1 should ever be invalidated, a stayed sentence of 32 months, rather than 16 months, on count 2 will ensure that defendant's punishment is commensurate

with his criminal liability. [Citation.] Furthermore, the imposition of a 'consecutive' and 'stayed' sentence would be meaningless because the stayed sentence would only operate if the principal count were eliminated. Therefore, a stayed sentence cannot be consecutive to a principal sentence." (*Ibid.*)

In this case, the court stated that it was imposing a term based on one-third of the middle term *concurrent* to another term, but section 1170.1, subdivision (a), is inapplicable to concurrent sentences as well. It applies only to consecutive sentences and neither to stayed sentences nor to concurrent sentences. Since the sentence should have been stayed—not consecutive and not concurrent—it could not be based on one-third of the middle term.

The People suggest that we should remand for resentencing on count 3; Gutierrez does not argue to the contrary. After trying to find a way to avoid this expense, we reluctantly agree. The sentence closest to the one the court imposed would be the low term of two years (§ 461, subd. (a)), doubled to four years for the prior strike. We cannot assume the court would have imposed the low term, however, since it found aggravating factors and no mitigating factors when it sentenced on count 1, which involved the same facts. We also cannot assume the court would have imposed the middle term (four years doubled to eight) or the high term (six years doubled to 12), since those figures are much higher than the term the court actually imposed. The only solution is to remand to allow the trial court to exercise its discretion in selecting a term.

Finally, the People point out that the abstract of judgment incorrectly states that the sentence imposed for count 3 was two years and was the upper term. This point is moot, since the sentence actually pronounced also was erroneous. The abstract will be corrected when the resentencing takes place.

B. Counts 5 and 6

The court stated orally that the sentence for count 5, receiving stolen property, was one year four months. The abstract of judgment erroneously states that the sentence for count 5 is two years four months. For the firearm enhancement on count 6, the court

stated that the sentence was three years four months. The abstract of judgment erroneously states that the sentence for that enhancement is two years four months. The two errors cancel each other out, but the abstract still should be correct. We will order the trial court to amend it.

DISPOSITION

The sentence on count 3 is reversed and the case remanded for resentencing on that count. Specifically, the trial court must determine whether the doubled lower, middle, or upper term applies, and must stay the term it selects. In addition, the abstract of judgment must be amended to show that the sentence for count 5 is one year four months, and the sentence for the section 12022.5, subdivision (a)(1), firearm enhancement on count 6 is three years four months. The trial court will forward the corrected abstract of judgment to the proper correctional authorities. The judgment is affirmed in all other respects.

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Wiseman, Acting P.J.

WE CONCUR:

_____
Levy, J.

_____
Detjen, J.